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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ADRIAN FOX et al.,

Plaintiffs and Appellants,

v.

NISSAN NORTH AMERICA, INC.,

Defendant and Respondent.

A130209

(San Francisco City & County  
Super. Ct. No. CGC-09-490470)

The trial court sustained without leave to amend the demurrer of respondent Nissan North America, Inc. (Nissan) to all causes of action alleged in a proposed consumer class action on behalf of appellants Adrian Fox and others.<sup>1</sup> Fox appeals the judgment entered dismissing that action, contending that the trial court erred in sustaining the demurrer because there was a triable issue of material fact about whether using power valve screws in Nissan engines was a material defect. We reverse the judgment.

**I. FACTS<sup>2</sup>**

In September 2004, appellant Adrian Fox purchased a 2002 Nissan Pathfinder. The vehicle was covered by a five-year warranty that expired in 2007. During the warranty period, Fox brought the vehicle into an authorized Nissan dealership, but he was not told of a known defect in the engine—that power valve screws might loosen and

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<sup>1</sup> Adrian Fox, William McMullen and Scott Winkler are all appellants in this matter.

<sup>2</sup> As a demurrer assumes that the facts alleged in the challenged complaint are true, our statement of facts makes the same assumption. (See *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

cause engine damage. In February 2009—after the warranty had expired—a loud banging noise prompted Fox to cease operating his vehicle, and to have it towed to a repair garage. The mechanic discovered that two power valve screws in the intake manifold had loosened, detached and been drawn into the engine, damaging it beyond repair. Nissan refused to replace the engine, as the warranty had expired before the damage occurred. Fox paid thousands of dollars to replace the engine.

Appellant William McMullen owned a 2003 Nissan Altima. The vehicle was covered by a five-year warranty that expired in 2008. During the warranty period, McMullen brought the vehicle into an authorized Nissan dealership, but he was not told of the defect in the engine. In September 2009, he heard a loud noise from his vehicle, which began running poorly. A mechanic examined the engine and advised McMullen that unriveted screws holding together a butterfly valve had vibrated out of place and had been ingested into the engine. McMullen spent about \$500 to attempt an engine repair. A month later, the same problem arose. This time, McMullen's engine failed and the vehicle lost power while he was driving on the freeway. Nissan refused to replace the Altima's engine, as the engine warranty period had run before the engine failed.

In September 2003, appellant Scott Winkler leased a 2003 Nissan Pathfinder LE. He purchased a five-year extended warranty from Nissan, which expired in 2008. In 2005, Winkler purchased the vehicle from Nissan. He brought the vehicle into an authorized Nissan dealership during the warranty period, but was not told what Nissan knew—that the vehicle had a defective engine. In November 2009, Winkler heard a loud noise while driving the Pathfinder. He had the vehicle towed to an authorized Nissan dealer. The dealer advised him that one or more power valve screws had loosened, detached and fallen into the engine, requiring it to be rebuilt or replaced. Nissan refused to replace the engine, as the warranty period had expired. Winkler had his engine rebuilt at a cost of \$3,850 and spent \$600 in rental car charges.

In July 2009, Fox filed a class action complaint against Nissan. A first amended complaint was soon filed, alleging that Nissan sold or leased vehicles with defective engines. It alleged that the engines were assembled using power valve screws that were

prone to loosen and detach, sometimes causing engine failure and/or loss of control of the vehicle. Fox brought the action on behalf of himself and all others who purchased, leased or had serviced various Nissan vehicles—including Pathfinders, Altimas and Sentras—after 1999. In addition to alleging the facts related to Fox’s experience with his vehicle’s power valve screws, the complaint also alleged numerous complaints about similar problems posted to online consumer forums. One online reporter stated that the power steering and brakes on a 2003 Nissan Altima locked up while travelling 70 miles per hour on a busy highway mountain pass. The reporter stated “I was almost killed” as the uncontrolled car drifted into other traffic. The first amended complaint alleged six causes of action—violations of the state Consumers Legal Remedies Act (CLRA) and the unfair competition law (UCL); fraudulent concealment or nondisclosure; breach of express and implied warranty; and unjust enrichment. This complaint sought class certification; restitution; compensatory and punitive damages; injunctive relief; and reasonable costs and attorney fees. (Bus. & Prof. Code, §§ 17200-17210; Civ. Code, §§ 1750-1784, 1792, 1793.)

In September 2009, Nissan demurred to all causes of action alleged in the first amended complaint.<sup>3</sup> It requested that the trial court take judicial notice of its five-year express warranty for its engines. Fox opposed the demurrer. After a hearing, in December 2009, the trial court sustained the demurrer in part and overruled it in part. Nissan’s demurrer to the CLRA cause of action was sustained for failure to allege facts supporting an agreement and transaction occurring between Fox and Nissan. The demurrer on the fraud cause of action was sustained because Fox failed to plead fraud with specificity, reliance and intent to deceive. The demurrer to the express warranty cause of action was sustained, as Fox’s allegation of an inherent defect did not state this cause of action. The trial court concluded that latent defects discovered after expiration of the express warranty period were not covered. The demurrer to the implied warranty cause of action was also sustained, because Fox failed to plead the existence of vertical

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<sup>3</sup> Nissan moved to strike aspects of the various complaints. The trial court concluded that these motions were moot once the demurrers were granted.

privity between Fox and Nissan to support an implied warranty. The trial court found that Fox had also failed to allege that he purchased a new Pathfinder rather than a used one. The demurrer to the UCL and unlawful enrichment causes of action were overruled. The ruling did not prejudice the parties to raise other issues if other challenges to the pleadings were raised. Fox was given leave to amend the four causes of action for which the demurrer was sustained.

In January 2010, Fox—now joined by McMullen and Winkler—filed a second amended complaint, alleging all but the breach of implied breach of warranty cause of action. The personal experiences of Fox, McMullen and Winkler (hereafter, collectively Fox) were detailed, as were the reports from the consumer online forums that were recounted in the first amended complaint. In February 2010, Nissan demurred to all five causes of action in this complaint, which Fox again opposed. Again, Nissan asked the trial court to take judicial notice of its five-year express warranty on its engines. In April 2010, after a hearing, this demurrer was also sustained with leave to amend as to all causes of action. On the CLRA cause of action, Fox had yet to plead representations beyond mere “puffery”—or representations that relate directly to the alleged defect. On the UCL cause of action, Fox had failed to allege with particularity the fraudulent business practice or legal violation. The fraudulent concealment-nondisclosure cause of action was held to lack specificity. The trial court ruled that Fox did not adequately allege a serious personal safety risk that he or any identifiable class member experienced. On the breach of express warranty cause of action, the trial court again held that no claim was stated because latent defects discovered after expiration of the warranty are not covered. The trial court sustained the demurrer to the unjust enrichment cause of action because it depended on the survival of another cause of action.

In May 2010, Fox filed a third amended complaint that alleged four causes of action—violations of the CLRA and the UCL, fraud and unjust enrichment, but not any breach of warranty. Again, the third amended complaint included the personal experiences of the three named plaintiffs and recitations of consumer online forums. Another demurrer was filed to Fox’s entire complaint and opposed. Another hearing was

conducted on the demurrer. This time, in August 2010, Nissan's demurrer was sustained without leave to amend, as the trial court found that there was no reasonable probability that the complaint's defects could be cured by amendment. The trial court made a series of rulings: that the claimed injury occurred outside the warranty period; that the complaint did not adequately allege a serious personal safety risk to any named plaintiff or identifiable class member; that Fox had not established a duty to disclose an alleged defect, reliance or violation of law; that no misrepresentations about the power valve screws were identified, nor was any omission identified that was contrary to Nissan's actual representations; that Nissan's advertising did not relate to the alleged defect and that its representations constituted mere puffery; and that Nissan's failure to disclose a defect that might shorten the effective lifespan of the vehicle or a part of it that functioned as warranted throughout the warranty period could not be characterized as a defect causing substantial injury to consumers. Later that month, judgment was entered dismissing Fox's action.

## **II. DISCUSSION**

### *A. Standard of Review*

On appeal, Fox contends that the trial court erred by sustaining Nissan's demurrer without leave to amend. He argues that the materiality of the defect was a triable issue of fact. A demurrer tests the legal sufficiency of the complaint. (*City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 869 (*City of Morgan Hill*); *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497; see Code Civ. Proc., § 430.10, subd. (e).) On review from a judgment dismissing an action after sustaining a demurrer without leave to amend, we conduct an independent review of the complaint to determine if—as a matter of law—it stated facts sufficient to constitute a cause of action. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125; *Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, 1264 (*Bardin*); *Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.) If we conclude that Fox stated a cause of action under any possible legal theory, the demurrer must be overruled. (See *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967; *City*

*of Morgan Hill, supra*, 118 Cal.App.4th at p. 870; see also *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 870.) However, if we find that the facts alleged do not state a cause of action as a matter of law, then we must find that the demurrer was properly sustained by the trial court. (*City of Morgan Hill, supra*, 118 Cal.App.4th at p. 870; *Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 55.)

A demurrer raises no *factual* issues, but assumes the facts alleged in the complaint to be true. On appeal, we interpret the complaint in a reasonable manner. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 319; *Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1252.) We deem the demurrer to admit all material facts that are properly pled. (*Aubry v. Tri-City Hospital Dist., supra*, 2 Cal.4th at p. 967; *Satten v. Webb* (2002) 99 Cal.App.4th 365, 374-375; see *Moore v. Conliffe* (1994) 7 Cal.4th 634, 638.) We accept as true those facts that may be implied or inferred from those expressly alleged. (*City of Morgan Hill, supra*, 118 Cal.App.4th at p. 869; *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) We may consider facts that are subject to judicial notice. (*Moore v. Conliffe, supra*, 7 Cal.4th at p. 638; *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) We do not assume the truth of any *legal* contentions, deductions or conclusions set out in the complaint. (*Aubry v. Tri-City Hospital Dist., supra*, 2 Cal.4th at p. 967; *Bardin, supra*, 136 Cal.App.4th at p. 1263; *City of Morgan Hill, supra*, 118 Cal.App.4th at p. 870.)

## B. Materiality

### 1. Effect of Warranty Law

Fox contends that the trial court erred when it found that Nissan's failure to report the use of the power screws was not an omission of a material fact. We conclude that the failure to inform an automobile purchaser that a part may require replacement after the warranty period expires is not an omission of a material fact, unless facts are alleged raising a serious safety concern.

Our conclusion is grounded in warranty law. A latent defect discovered after the warranty period has expired cannot form the basis of a breach of express warranty cause of action, even if the warrantor knew of the defect at the time of sale. (*Daugherty v.*

*American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824, 830-832 (*Daugherty*).) Almost all automobile product failures discovered after the expiration of the warranty period can be linked to a latent defect existing during that period. Eventually, all automobile parts wear out. Automobile manufacturers know the effective life of certain parts, as well as the likelihood of part failure within a certain time period. Thus, manufacturers always know that certain automobile parts will fail after the expiration of the warranty period. Making that failure actionable after the expiration of the warranty period would render express warranties meaningless and would place an undue burden on manufacturers, requiring them to guarantee—in effect—that each vehicle would be free of defects for its life. (*Id.* at pp. 830-831.) As a matter of law, a manufacturer who promises to repair or replace defective materials or workmanship for a term of years does not agree to repair latent defects that lead to malfunction after the warranty period expires. (*Id.* at p. 832.)

## 2. *Safety Defect*

Unless the plaintiff alleges a personal injury or a significant safety-related defect, the failure of an automobile part after the expiration of the warranty period is not actionable. (See *Daugherty, supra*, 144 Cal.App.4th at pp. 835-836; *Bardin, supra*, 136 Cal.App.4th at p. 1270.) Fox asserts that the complaint alleges facts showing such a safety defect. The complaint alleged that the engines were dangerously defective, alleging that the defect “seriously jeopardizes” the safety of drivers of the Nissan vehicles and others, because the resulting loss of power caused drivers to lose control of the vehicles. It also alleged that the loud noises were distracting and prompted drivers to immediately pull to the side of the road, creating an unreasonable risk of injury. One person posting to a consumer online forum reported a potentially fatal incident resulting from the loss of control of a Nissan vehicle.

We conclude that these allegations of the third amended complaint are sufficient to allege a material safety defect. The facts alleged recounting the experiences of the named plaintiffs and the cited reports to consumer online forums of vehicles losing power suddenly raise a reasonable inference that a serious injury could occur if the failure of the

power valve screws led to engine failure while the vehicle was being driven. These factual allegations of materiality are sufficient to overcome Nissan's demurrer to the fraud/nondisclosure, CLRA, UCL and unjust enrichment causes of action. Thus, the trial court erred in sustaining the demurrer to the third amended complaint.

The judgment of dismissal is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion.

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Reardon, J.

We concur:

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Ruvolo, P.J.

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Rivera, J.